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Supreme Court, U.S.
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No. 03-244

IN THE

Supreme Court of the United States

DAIWA SECURITIES AMERICA INC.,

Petitioner,

—against—

FRED KAYNE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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PETITIONER'S REPLY BRIEF

Petitioner Daiwa Securities America Inc. ("Daiwa") respectfully submits this reply brief in further support of its Petition for a writ of certiorari.

In our Petition, we demonstrated that this Court should grant a writ of certiorari in this case because the judgment below -- to the extent that it imposed an overbroad settlement bar order and declined to apply relevant provisions of the Private Securities Litigation Reform Act ("PSLRA") to plaintiffs who first asserted securities claims *after* that statute's effective date -- raises important issues of federal law that are fundamental to the future conduct of this case, as well as complex litigation throughout the country. A ruling on the proper scope of settlement bar orders (an issue as to which existing case law is inconsistent) will advance the resolution of countless multi-party actions pending in the lower federal courts. Moreover, a definitive determination as to the temporal reach of the PSLRA will assist lower federal courts not only in cases under that statute, but also in cases under other statutes with similar language.

Neither BDO Dunwoody, LLP ("BDO") nor the *Kayne* Plaintiffs[1] have effectively rebutted our showing that

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[1] "*Kayne* Plaintiffs" refers to Fred Kayne, Stephen Kayne, Milton T. Okun, Rosemary Okun, Merrill, Lynch, Pierce, Fenner & Smith (as custodian for Milton T. Okun Individual Retirement Accounts), Don Wohl, Glen Tobias, Ken Berg, Robert A. Bronstein, Bronstein Family Trust, Bruce Burnam, Marcia Burnam, Kathleen A. Cohen, William Corbett, Cutler Family Trust of 1989, Martin Goldfarb, Richard Gunther, Harpel Partners, L.P., Harpel Wheelock Partners, L.P., Harpel International Ltd., Richard L. Milsner, Joel Rumm, Victor Scaravilli, Tri S Partners, Dreilander Beteiligung Objekt DLF 93/14-
(footnote continued)

Daiwa's petition raises important issues for this Court. Nor have they come close to showing that the court below correctly resolved those issues. Contrary to BDO's contentions, Daiwa's claims against BDO -- based on, *inter alia*, the comfort letters BDO delivered directly to Daiwa in connection with the July 1993 public offering of securities by MTC Electronic Technologies Co., Ltd. ("MTC") -- are *not* "thinly-disguised claims for contribution." Accordingly, the judgment credit Daiwa received as compensation for the loss of its contribution and indemnity claims (based on BDO's liability to plaintiffs) cannot justify a bar order extinguishing *independent* claims of that sort, premised on breaches of duties BDO owed directly to Daiwa. (*See* Point I, *infra*.) Moreover, neither the *Kayne* Plaintiffs nor BDO offers any persuasive justification for the determination below that provisions of the PSLRA concerning settlement bar orders should not apply to those of the *Kayne* Plaintiffs who first sued Daiwa in 1996 and 1997. (*See* Point II, *infra*.) We respectfully request that the Court grant Daiwa's Petition.

I. The Bar Order in Favor of BDO is Impermissibly Overbroad

BDO does not dispute, nor could it, the rule of law -- founded in basic notions of fairness -- that settlement bar orders, while they may extinguish contribution or equitable indemnity claims for which non-settling parties receive compensation through judgment credit, may not extinguish claims *independent* of contribution or equitable indemnity. *See, e.g., TBG, Inc. v. Bendis*, 36 F.3d 916, 929 (10th Cir.

Walter Fink-KG and Zwolfte Dreilander Beteiligung DLF 92/12-Walter Fink-KG, all plaintiffs-appellees below and respondents before this Court.

1994); *In re Masters Mates & Pilots Pension Plan*, 957 F.2d 1020, 1033 (2d Cir. 1992); App. 19a.[2] Nevertheless, BDO argues that the "capped proportionate share" judgment credit provided by the settlement bar order in this case adequately compensates Daiwa for the loss of its independent claims against BDO because those claims are "merely reworded contribution claims." (BDO Br. 11-13.[3]) BDO is wrong.

The "capped proportionate share" judgment reduction rule simply ensures that, in the event plaintiffs should prevail at trial, Daiwa will pay no portion of BDO's liability to the plaintiffs. Judgment reduction does not (and does not purport to) provide compensation for damages caused by BDO's breaches of duties owed directly to Daiwa. The court below recognized as much by entering a bar order that *permits* Daiwa to assert independent claims against BDO. (App. 20a-21a.)

There is, however, no basis for the lower court's determination to extinguish Daiwa's independent claims against BDO "to the extent that the injury to [Daiwa] under any such claim is its liability to the *Kayne* plaintiffs." (App. 18a-20a.) As we have noted, judgment reduction at trial justifies termination of Daiwa's contribution and equitable indemnity claims because it credits Daiwa for any liability arising from BDO's breaches of duties owed to plaintiffs. But to the extent BDO has breached legal duties it owed directly to Daiwa, and to the extent Daiwa *itself* has liability to plaintiffs, judgment credit provides *no* compensation. Thus, if BDO -- by, for example,

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[2] "App. __" refers to the Appendix annexed to Daiwa's Petition for a writ of certiorari.

[3] "BDO Br." refers to the brief filed by BDO in opposition to Daiwa's Petition.

negligence or recklessness in issuing comfort letters to Daiwa -- caused Daiwa *itself* to incur liability to plaintiffs, judgment reduction does not compensate Daiwa for the loss of its right to recover that liability, as an item of damages, from BDO.

For that reason, as we pointed out in our Petition, a number of lower federal courts have correctly held that settlement bar orders may *not* extinguish independent claims against the settling parties, even where damages on those claims overlap with the non-settling defendants' liability to plaintiffs. *See, e.g., In re Cendant Corp. Sec. Litig.*, 139 F. Supp. 2d 585, 596 (D.N.J. 2001); *In re Sunrise Sec. Litig.*, 793 F. Supp. 1306, 1321 (E.D. Pa. 1992); *In re Cenco Inc. Sec. Litig.*, 642 F. Supp. 539, 542 (N.D. Ill. 1986). While BDO cites a handful of cases to the contrary,[4] we respectfully submit that those decisions inappropriately ignore the principle that courts may not enter settlement bar orders without providing fair compensation to non-settling parties for all extinguished claims. At best, BDO's citations to authority demonstrate the inconsistency among the lower federal courts regarding an important aspect of practice in securities and other complex litigation -- inconsistency that this Court should resolve by granting a writ of certiorari in this case.[5]

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[4] *See* BDO Br. 12 (*citing In re U.S. Oil & Gas Litig.*, 967 F.2d 489 (11th Cir. 1992); *Bankers Trust Co. v. Rhoades*, No. 82 Civ. 5590, 1992 WL 170677 (S.D.N.Y. July 2, 1992); *South Carolina Nat'l Bank v. Stone*, 749 F. Supp. 1419 (D.S.C. 1990)).

[5] BDO also urges that broad bar orders are necessary to encourage settlement because they provide settling defendants with finality and the comfort that they are protected from future litigation. (BDO Br. 10-11.) The goal of encouraging settlement, however, cannot justify

(footnote continued)

II. The PSLRA Applies to Certain of the *Kayne* Plaintiffs

BDO and the *Kayne* Plaintiffs also fail to offer any persuasive response to our showing that the court of appeals erred in failing to apply the settlement-related provisions of the PSLRA to the 19 plaintiffs who asserted their claims by amendments to the complaint in this action in 1996 and 1997 -- well after the PSLRA took effect.

First, neither BDO nor the *Kayne* Plaintiffs has offered adequate support for the notion that parties who did not sue prior to December 22, 1995 could nevertheless avoid the effect of the PSLRA by joining an already-pending action. As noted in our Petition, the court in *Adler v. Berg Harmon Associates*, 790 F. Supp. 1235 (S.D.N.Y. 1992), persuasively rejected the formalistic analysis, premised on a supposed distinction between "claims" and "actions," that BDO and the *Kayne* Plaintiffs advance. (Pet. 17-18.) Moreover, the cases BDO and the *Kayne* Plaintiffs cite on this point -- *Edge Partners, L.P. v. Dockser*, 944 F. Supp. 438, 441 (D. Md. 1996); *Wallace v. Systems & Computer Tech. Corp.*, No. Civ. A 95-CV-6303, 1997 WL 602808 (E.D. Pa. Sept. 23, 1997) and *McKowan Lowe & Co. v. Jasmine, Ltd.*, 976 F. Supp. 293 (D.N.J. 1997) -- similarly do not advance their position. In all three of those cases, plaintiffs filed their action before the enactment of the PSLRA and then the *same plaintiffs* sought to amend their complaint after December 22, 1995. *Edge*, 944 F. Supp. at 439-40; *Wallace*, 1997 WL 602808, at *1; *McKowan*, 976 F. Supp. at 295; *see* Pet. 19 n.11. None of those cases

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depriving non-settling parties, without compensation, of any claims they may have against settling parties, whether those claims are for contribution or equitable indemnity, or are independent in nature.

involved the effect of the PSLRA on plaintiffs who -- like 1996 and 1997 plaintiffs here -- did not sue until *after* the PSLRA took effect.[6]

Second, there is no merit to the *Kayne* Plaintiffs' argument that the filing of the MTC-related class actions somehow insulates from the PSLRA securities claims asserted by opt-out plaintiffs in 1996 and 1997 under the tolling principle enunciated in *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). (Kayne Br. 7.[7]) Plaintiffs identify no case in which the *American Pipe* doctrine has been applied for any purpose other than to toll the statute of limitations on claims asserted in a class action. Indeed, the only case on point of which we are aware rejected the position plaintiffs advocate. In *ABF Capital Mgmt. v. Askin Capital Mgmt. L.P.*, 957 F. Supp. 1308 (S.D.N.Y. 1997), plaintiffs -- who apparently had opted out of a class action filed in 1995 -- argued that, because of the pendency of the class action, the PSLRA would not apply to bar securities fraud-based RICO claims they asserted in 1996. *Id.* at 1314, 1316. The court rejected that argument:

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[6] The remaining case BDO cites on this point, *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999), is similarly irrelevant. The *Waters* court did not consider, much less endorse, any party's attempt to avoid an act of Congress by joining an action that had been pending prior to its effective date. Indeed, because *Waters* was a class action alleging claims in connection with commodities trading -- rather than claims under the Securities Act of 1933 or the Securities Exchange Act of 1934 -- the PSLRA was irrelevant to that case. *Id.* at 1297 n.11.

[7] "Kayne Br." refers to the brief filed by the *Kayne* Plaintiffs in opposition to Daiwa's Petition.

> Plaintiffs also contend that their RICO claim should be permitted to stand because the related [class] action was filed prior to passage of the [PSLRA]. However, the [class action] complaint is irrelevant here. Plaintiffs attempt to analogize their situation to that of a class plaintiff whose time to file a complaint is extended by the filing of a class complaint. There is no support for this novel position. Plaintiffs here have chosen to file a separate complaint, essentially opting out of the putative class action, and thus cannot reap the benefits of the filing of that action. Moreover, tolling a statute of limitations is entirely different from suspending the effect of an act of Congress.

Id. at 1321. This Court likewise should reject plaintiffs' request for an unprecedented and unwarranted extension of the *American Pipe* doctrine.

Third, the *Kayne* Plaintiffs' reference to the retroactivity analysis of *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) is irrelevant. As *Landgraf* and subsequent cases have held, Congress has authority to enact statutes applicable to past events, and the "presumption against retroactivity" plaintiffs rely on has no application when Congress expresses its intent to invoke that authority. *Landgraf*, 511 U.S. at 278; *see also Hughes Aircraft Co. v. United States*, 520 U.S. 939, 946 (1997). Here, as we noted in the petition, numerous courts have found that section 108 of the PSLRA expressly commands that the statute's amendments to the Exchange Act take immediate, prospective effect. (Pet. 17 n.10.) That express directive encompasses plaintiffs who first asserted their claims after December 22, 1995. Accordingly, and in the face of a clear Congressional directive, the Court need not consider whether the PSLRA's settlement provisions have "retroactive effect" within the meaning of *Landgraf*.

Fourth, plaintiffs incorrectly suggest that Daiwa, by agreeing not to object to the filing of plaintiffs' amended complaint, somehow waived application of the PSLRA to plaintiffs who first sued in 1996 and 1997. The record does not support that contention. To the contrary, Daiwa expressly reserved all of its defenses -- including application of the PSLRA -- as to plaintiffs who first sued after December 1995, advising the District Court in January 1997, that Daiwa and other parties agreed to "withdraw their opposition to the Kayne plaintiffs' motion to amend the Second Amended Complaint (*although preserving all rights to move to dismiss that complaint*)." Any claim of waiver is baseless.

Finally, neither BDO nor the *Kayne* Plaintiffs offer any authority in support of their argument that considerations of "feasibility" could excuse application of the PSLRA in this case to those of the plaintiffs who otherwise would be subject to its terms. (BDO Br. 9-10; Kayne Br. 7.) Initially, there is no substantial conflict between the settlement provisions of the PSLRA and the pre-PSLRA law applicable to the original plaintiffs in many respects. For example:

- Congress codified the principles of *Masters Mates* in the PSLRA by strictly limiting settlement bar orders to contribution claims. *See* 15 U.S.C. § 78u-4(a)(7).
- The PSLRA mandates only mutual bar orders, implementing judicially recognized fairness concerns.

Even if that were not so, applying the PSLRA to some of the plaintiffs would not create the parade of horribles that BDO and the *Kayne* Plaintiffs envision. Because this is not a class action, each plaintiff's damages will have to be individually determined at trial. The settlement proceeds

will logically be allocated according to the individual damages proved at trial and, with that information in hand, determination of judgment credits and application of bar orders -- whether under the PSLRA or pre-PSLRA law -- would be a relatively straightforward matter.

CONCLUSION

For all of the foregoing reasons, and those set forth in Daiwa's Petition, this Court should issue a writ of certiorari to review the judgment of the court of appeals.

Dated: September 24, 2003

Respectfully submitted,

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